

BOOKLET FILE COPY ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900

FACSIMILE:
(202) 326-7999

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

November 8, 1999

VIA HAND DELIVERY

Magalie R. Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, D.C. 20554

RECEIVED
NOV - 8 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Application by New York Telephone Company (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York.
CC Dkt. No. 99-295

Dear Ms. Salas:

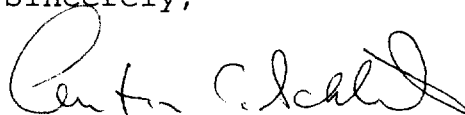
Enclosed for filing are an original, two copies, and an electronic version of BellSouth Corporation's Reply Comments in the above-captioned matter.

In addition twelve paper copies and twelve electronic versions have been provided to Ms. Janice Myles of the Policy and Programming Division, Common Carrier Bureau.

Please stamp and return the extra copy to the person filing this Petition.

Please call me at 202-326-7907 if you have any questions. Thank you for your assistance in this matter.

Sincerely,



Austin C. Schlick

No. of Copies rec'd
List ABCDE

012345

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
NOV - 8 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

The Application by New York Telephone
Company (d/b/a Bell Atlantic-New York),
Bell Atlantic Communications, Inc., NYNEX
Long Distance Company, and Bell Atlantic
Global Networks, Inc., for Authorization To
Provide In-Region, InterLATA Services in
New York

CC Docket No. 99-295

REPLY COMMENTS OF BELLSOUTH

CHARLES R. MORGAN
JIM O. LLEWELLYN
JONATHAN B. BANKS
1155 Peachtree Street, N.E.
Atlanta, Georgia 30367
(404) 249-2051

AUSTIN C. SCHLICK
GEOFFREY M. KLINEBERG
JIDE O. NZELIBE
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

November 8, 1999

SUMMARY

Despite the Commission's explicit recognition of the benefits of Bell Company entry into the interLATA market, some CLECs have suggested delaying Bell Atlantic's entry in New York for reasons that are directly contrary to the language of the Act and to the Commission's policies, and that would not further any legitimate regulatory purpose.

First, certain CLECs want the Commission to second-guess and override state commission judgments on issues that Congress and the Commission have left to the states. These include the development of performance measures, implementation of the TELRIC pricing methodology, and the development of tests for operations support system ("OSS") functionality. In each of these areas, the Commission should continue to defer to the reasoned judgments of the state commissions and reject the suggestion that it intrude into matters of state jurisdiction. Otherwise, the Commission would inflict a two-fold harm: it would unnecessarily delay beneficial interLATA competition and undermine the states' ability to be innovative and to meet local needs.

Second, some CLECs propose that the Commission deny Bell Atlantic's application on the basis that Bell Atlantic has failed to provide facilities or services to its wholesale customers that are better than those Bell Atlantic provides to its own retail operations. The Act's nondiscrimination standard, however, requires only access in substantially the same time and manner as the incumbent provides to itself or (where there is no retail analogue) access that affords an efficient competitor a meaningful opportunity to compete. Untethering the Commission's application of checklist requirements from this mooring would set the entire section 271 process adrift.

Third, some other CLECs propose that the Commission impose some kind of metric test for market penetration by CLECs, under the guise of the Commission's public-interest inquiry. Congress explicitly rejected any market-entry test, and the Commission has no authority to impose such a test in reviewing an application for section 271 relief, as the Commission itself has recognized. Once again, adopting such a standard would deny consumers the benefits of fully opening *all* telecommunications markets to competition.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	i
DISCUSSION.....	2
I. THE COMMISSION SHOULD DEFER TO THE STATE COMMISSIONS' REASONABLE DETERMINATIONS REGARDING ISSUES LEFT TO THEIR DISCRETION.....	2
A. The Commission Should Defer to the NYPSC's Decision on Performance Measures.....	5
B. The New York Testing Approach is Only One of Many Routes To Demonstrating the Commercial Viability of OSS.....	8
C. The Commission Should Defer to State Pricing Determinations.....	11
D. The Commission Should Reject Proposals To Condition Section 271 Authorization on Resolution of Routine Enforcement Issues.....	15
II. NONDISCRIMINATORY PERFORMANCE MUST BE MEASURED AGAINST THE BELL COMPANY'S OWN PERFORMANCE IN THE STATE WHERE INTERLATA RELIEF IS SOUGHT.....	16
III. THERE IS NO METRIC TEST FOR BELL COMPANY INTERLATA ENTRY.....	18
CONCLUSION	20

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

The Application by New York Telephone Company (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization To Provide In-Region, InterLATA Services in New York

CC Docket No. 99-295

REPLY COMMENTS OF BELLSOUTH

The Commission has unambiguously held that the Bell companies' provision of in-region, interLATA services will promote long distance competition and thereby benefit consumers.¹ The Commission has also acknowledged that such entry will encourage innovative new services and marketing efficiencies.² In light of these findings, delays in granting section 271 applications can only be justified if such delay is (1) compelled by the plain language of section 271, or (2) both consistent with section 271 and required to fulfill other policies that the Commission has found to outweigh the costs of delaying entry. A number of commenters urge

¹ Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, 20746, ¶ 388 (1997) ("Ameritech Michigan Order").

² Second Report and Order and Third Report and Order, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, 15809, ¶ 92 (1997).

this Commission to deny Bell Atlantic's application without regard to this standard. In effect, these commenters invite this Commission to second-guess the state commission's judgment and put certain carriers' self interest above the public interest. The Commission should refuse this invitation.

DISCUSSION

I. THE COMMISSION SHOULD DEFER TO THE STATE COMMISSIONS' REASONABLE DETERMINATIONS REGARDING ISSUES LEFT TO THEIR DISCRETION.

At the heart of the Telecommunications Act of 1996 lies a cluster of provisions that gives the states pervasive involvement in the development of local competition. The Act relies principally on private negotiations to translate its general provisions into commercial reality. Sections 251 and 252 not only establish substantive requirements for telecommunications carriers, but also give the states principal responsibility for ensuring that incumbent LECs carry out the same duties that comprise the core of section 271(c)(2)(B)'s competitive checklist. These duties cover such areas as interconnection, network unbundling, resale, number portability, dialing parity, access to poles, and reciprocal compensation arrangements.³ Section 252 provides the procedural framework – including approval of interconnection agreements, arbitration, and approval of statements of generally available terms and conditions – through which states supervise and enforce the contractual commitments of incumbent LECs and CLECs.

Although the Supreme Court's decision in *AT&T v. Iowa Utilities Board*⁴ vindicated the Commission's assertion of jurisdiction over a large swath of local competition issues,⁵ both the

³ 47 U.S.C. § 251(a) – (c), (e).

⁴ 119 S. Ct. 721 (1999).

⁵ *Id.* at 732-33.

Commission and the Court recognized that states would continue to play an indispensable role in setting prices and promulgating standards under the Act. Before the Eighth Circuit, for example, the Commission neither “contest[ed] the fact that state commissions have the responsibility to set prices” nor “claim[ed] that the FCC’s pricing authority [was] exclusive.”⁶ Instead, the Commission and the CLECs “argue[d] that the Act established shared or parallel jurisdiction between the states and the FCC.”⁷ The Supreme Court accepted the Commission’s position that the Act intended to set up a parallel jurisdictional regime, explicitly acknowledging that the states perform a critical function in this statutory scheme.⁸

Similarly, the Commission has repeatedly recognized in the context of section 271 that state commissions’ familiarity with local carriers and local market conditions gives them special insight and expertise. As Commissioner Powell put it, the Commission should “defer[] to [the state commissions’] judgments, according to the unique strengths and perspectives they . . . bring to the local market-opening process.”⁹ And in its orders, the Commission has stated that it will give special consideration to those “state determinations of fact that are supported by a detailed and extensive record.”¹⁰ A state’s findings under section 271 deserve close attention not only

⁶ *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997), *aff’d in part, rev’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

⁷ *Id.*

⁸ “It is the [s]tates that will apply [the pricing standards] and implement [the] methodology, determining the concrete result in particular circumstances.” *Iowa Utils. Bd.*, 119 S. Ct. at 732.

⁹ See Wake-Up Call: FCC Commissioner Michael Powell Calls for New “Collaborative Approach” to Section 271 Applications, FCC, Jan. 15, 1998, *available in* 1998 FCC LEXIS 191, at *8.

¹⁰ Memorandum Opinion and Order, *Application of BellSouth Corp., BellSouth Telecomms., Inc., and BellSouth Long Distance, Inc., for Provision of In-region, InterLATA*

because they have a special position under the statute,¹¹ but also because this Commission is not capable – particularly within the 90 days allotted for its review of Bell company applications – of duplicating the state commissions’ exhaustive, “live” investigations and their local market expertise developed through arbitration proceedings. These legal and practical considerations reinforce the general point, expressed by Chairman Kennard, that “[t]he goal of assuring competition . . . will only be achieved if the FCC and the states work together.”¹²

Section 271 proceedings represent a paramount example of parallel jurisdiction and a prime opportunity for the Commission to give effect to its endorsement of cooperative regulation. In particular, the Commission’s checklist analysis under section 271(c)(2)(B) invariably draws upon state commission decisions on a wide range of issues, including the development and implementation of performance measures, implementation of federal pricing methodologies to set prices, OSS testing, and the arbitration and enforcement of interconnection agreements. The checklist requirements do not permit – much less require – the Commission to preempt the states’ decisions in such areas. Rather, if the Commission finds that the efforts of a state commission to implement the applicable legal requirements are reasonable, it should accept the state’s judgments.

The public-interest inquiry of section 271(d)(3)(C) does not alter this jurisdictional balance. States bring important experience to this public-interest assessment, and their recommendations should be given great weight in the Commission’s determination. Moreover,

Servs. in Louisiana, 13 FCC Rcd 20599, 20617, ¶ 18 (1998) (“*Second Louisiana Order*”); *Ameritech Michigan Order*, 12 FCC Rcd at 20560, ¶ 30.

¹¹ See 47 U.S.C. § 271(d)(2)(B).

¹² William Kennard, Statement of Chairman of the FCC on the Filing of Petition for Writ of Certiorari, FCC, Nov. 19, 1997, *available in* 1997 FCC LEXIS 6388, at *1.

the scope of the Commission's own inquiry is significantly constrained.¹³ Section 271(d)(4) provides that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." This provision makes plain that the Commission may not use the public-interest inquiry effectively to override the cooperative state/federal structure for implementing the 1996 Act's local competition requirements.

A. The Commission Should Defer to the NYPSC's Decision on Performance Measures.

The Commission has decided not to promulgate national performance monitoring requirements, concluding that states were best positioned to adopt and implement any performance measurements and standards that may be required to satisfy section 271.¹⁴ The Commission has also rejected any suggestion that it should supplant work already done by the states in this area,¹⁵ concluding that the adoption of national performance measures is unnecessary where states have already initiated proceedings to develop such measurements and standards.¹⁶ In the *Second Louisiana Order*,¹⁷ moreover, the Commission specifically praised

¹³ See *NAACP v. FPC*, 425 U.S. 662, 669 (1976) ("[T]he use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.").

¹⁴ Notice of Proposed Rulemaking, *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, 13 FCC Rcd 12817, 12828-29, ¶¶ 23-26 (1998) ("NPRM"); see also Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, FCC 99-279, ¶ 380, 1999 WL 809551 (rel. Oct. 8, 1999).

¹⁵ *NPRM*, 13 FCC Rcd at 12829, ¶ 26.

¹⁶ *Id.* at 12828, ¶ 24.

¹⁷ *Second Louisiana Order*, 13 FCC Rcd at 20618-19, ¶ 22.

the work of states, such as Louisiana, that have done the hard work of developing these measurements.¹⁸

Like Louisiana, the NYPSC has taken its responsibility seriously, convening proceedings at considerable expense to implement performance standards and measures under the guidelines suggested in the Commission's *Notice of Proposed Rulemaking*.¹⁹ The NYPSC oversaw a process lasting two years, involving extensive collaboration with CLECs, and developing measures in more than 150 separate categories.²⁰ The resulting performance plan was subjected to a series of further filings, comments, and replies by interested parties.²¹ Since 1997, a carrier-to-carrier working group has developed and fine-tuned these measures.²² Based on these proceedings, the NYPSC has concluded that Bell Atlantic's current performance plan provides a sufficient basis to ensure future compliance with section 271.²³

Similarly, state commissions within BellSouth's territory — including the Georgia, Louisiana, and Mississippi commissions — have supervised the development of rigorous performance measurements and standards. For example, BellSouth has worked with the Georgia PSC and CLECs to develop a comprehensive set of Service Quality Measurements ("SQMs") covering nine categories: access to OSS for pre-ordering and ordering; ordering; provisioning; maintenance and repair; billing; operator services and directory assistance; E911; local

¹⁸ *Id.*

¹⁹ 13 FCC Rcd at 12829, ¶ 25.

²⁰ *See* Bell Atlantic Br. at 63-64.

²¹ *See* NYPSC Eval. App. at 165.

²² *See* Bell Atlantic's Dowell & Canny Decl. ¶ 11.

²³ NYPSC Eval. App. at 171-72.

interconnection trunk group performance; and collocation. (These performance measurements are available on BellSouth's website.²⁴) The consolidated proceeding during which the Georgia PSC evaluated BellSouth's Statement of Generally Available Terms and Conditions ("SGAT"), performance measurements, and access to OSS have, thus far, included 28 days of hearings and generated a 13,400 page record. The performance measures adopted by the Georgia PSC are substantially the same as – and, in a number of areas, more comprehensive than – the measurements suggested by the Commission in its Notice of Proposed Rulemaking.²⁵

While generally acknowledging the efforts of the NYPSC,²⁶ some CLECs argue that the Commission nevertheless should intervene by imposing additional requirements or "anti-backsliding" measures.²⁷ Sprint's principal claim is that Bell Atlantic would not be sufficiently deterred from poor performance by giving credits instead of cash payments as compensation for inadequate performance;²⁸ AT&T proposes an entirely new plan.²⁹ These same CLECs participated in (or at least had a full opportunity to participate in) the proceedings leading to the development of the particular measures they challenge. AT&T, for instance, admits that the NYPSC turned down its plan because of procedural failures.³⁰ But now, AT&T is trying to obtain through the "back door" what has already been rejected by the state commission. The

²⁴ See <<http://clec.bellsouth.com>>.

²⁵ *NPRM*, 13 FCC Rcd at 12829, ¶ 25.

²⁶ AT&T Comments at 1; Sprint Comments at 2.

²⁷ See, e.g., Sprint Comments at 24-30; AT&T Comments at 86-87.

²⁸ Sprint Comments at 29.

²⁹ AT&T's Pfau & Kalb Aff. ¶¶ 176-78.

³⁰ *Id.* ¶ 178.

efforts of state commissions to ensure compliance with local-competition standards by adopting performance measurements would become meaningless, and surely would be discouraged, if discontented parties were permitted to relitigate the very same issues in section 271 proceedings.

“It is not [the Commission’s] intent,” this Commission has said, “to undermine the work states have done in this area [of performance measures], but rather to build upon it and inform it, where necessary and helpful.”³¹ Consistent with this principle, the Commission should refuse the CLECs’ invitations to reopen state proceedings. Even if it could duplicate the thoroughness of the state proceedings within the 90 days available under section 271 (which is a practical impossibility), and even if it could become sufficiently expert about local market conditions (which is also unlikely), duplicating the NYPSC’s investigation would be both wasteful and counterproductive.

B. The New York Testing Approach Is Only One of Many Routes to Demonstrating the Commercial Viability of OSS.

The Commission has given Bell companies broad latitude in demonstrating nondiscriminatory access to their OSS. A Bell company may present “operational evidence to demonstrate that the operations support systems functions the [Bell company] provides to competing carriers will be able to handle reasonably foreseeable demand volumes for individual checklist items.”³² The Commission has not required any particular type of “operational evidence”: “such evidence *may* include carrier-to-carrier testing, independent third-party testing, and internal testing of operations support systems functions.”³³ Not only is no particular type of

³¹ *NPRM*, 13 FCC Rcd at 12829, ¶ 26.

³² *Ameritech Michigan Order*, 12 FCC Rcd at 20602, ¶ 110.

³³ *Id.* (emphasis added).

testing required, but the Commission has indicated that testing is a “less reliable indicator[] of actual performance than commercial usage.”³⁴

This broad mandate has left the states wide latitude in reviewing, or even developing, testing programs that answer market-specific questions about the Bell company and CLEC systems used in that market. New York, of course, has implemented a comprehensive test that exhaustively reviewed Bell Atlantic’s wholesale support systems.³⁵ In New York, KPMG acted as a “pseudo-CLEC” and conducted a testing scheme in which it evaluated all stages of Bell Atlantic’s relationship with a CLEC.³⁶ Although DOJ praises the New York plan, it also observes, KPMG “could not exactly replicate commercial use of Bell Atlantic’s systems.”³⁷ For this reason, DOJ prefers to rely upon “concurrent commercial use of these systems” for its assessment.³⁸ MCI WorldCom attacks the entire approach used in New York, faulting the test precisely because it did not use interfaces “buil[t] for use in a production environment.”³⁹

The NYPSC is not the only state commission that has undertaken OSS testing. The Georgia PSC, for example, adopted earlier this year a third-party testing scheme to conduct feature, function, volume and procedural tests of BellSouth’s OSS and related support functions. On October 18, 1999, BellSouth filed a revised Master Test Plan with the Georgia PSC. As in New York, the test administrator is KPMG.

³⁴ *Ameritech Michigan Order*, 12 FCC Rcd at 20618, ¶ 138.

³⁵ *See* DOJ Eval. at 5.

³⁶ KPMG Report at II4.

³⁷ DOJ Eval. at 5.

³⁸ *Id.*

³⁹ MCI WorldCom Comments at 28.

The Georgia PSC will use the results of the third-party test in its evaluation of BellSouth's ability to provide nondiscriminatory access to its OSS interfaces and to provide electronic preordering, ordering, provisioning, maintenance and repair, and billing. The test will also assess the accuracy of reports generated by BellSouth's performance-measurement systems. Although not required by the Georgia PSC order, the test will evaluate BellSouth's change management process for electronic interfaces. The test will evaluate both the ability of BellSouth's electronic interface to support reasonably foreseeable volumes and the adequacy of BellSouth's OSS interface documentation.

In contrast to the New York model, the Georgia test will focus on OSS areas that have not yet experienced significant commercial usage, as well as those areas where CLECs have expressed concerns regarding operational readiness. And instead of a "pseudo-CLEC" system like New York's, the test generally will use the regular production environment. This approach avoids the issues DOJ and MCI WorldCom have identified concerning the use of "dummy" testing systems.

As these complex state proceedings suggest, there can be no single national testing regime. The point is not that the New York testing is inadequate in any respect (it is not), but rather that the variety of approaches that states have taken should be encouraged. Testing is simply too dependent on the specific characteristics of each Bell company, the readiness of particular CLEC systems, and the local market conditions for the Commission to embrace the New York tests, or any other state's testing, as a nation-wide testing regime.⁴⁰

⁴⁰ See, e.g., ALTS Comments at 84-85.

On a related issue, Northpoint and other CLECs claim that, because KPMG did not test Bell Atlantic's xDSL-related offerings, it is not clear whether those services would be operationally ready if demanded at substantial volumes.⁴¹ Here, the CLECs set up a standard for section 271 compliance that literally could never be met. Across the country, CLECs expressed little interest in providing xDSL services at significant volumes when the New York test was being designed. And the NYPSC did not think it was necessary to order Bell Atlantic to include xDSL testing at the time. Bell Atlantic thus had no reason to test its xDSL capabilities at substantial volumes, and such testing was not required under Commission precedent because those volumes were not "reasonably foreseeable."⁴² Were it otherwise, a Bell company would have to anticipate at the *beginning* of its testing program what business plans will be asserted by CLECs at the *end* of the testing, six to twelve months later. No rational application of section 271 could make interLATA relief contingent on such a requirement that the Bell company correctly guess about matters that are well in the future and solely in the CLECs' control.

C. The Commission Should Defer to State Pricing Determinations.

While the Supreme Court affirmed the Commission's authority to set national pricing rules,⁴³ that decision also clarified that the states continue to have a significant role in the process.⁴⁴ Section 252(c)(2) requires that the states "apply [the FCC's] standards and implement that methodology, determining the concrete result in particular circumstances."⁴⁵ In fact, before

⁴¹ Northpoint Comments at 5; Covad Comments at 25.

⁴² *Ameritech Michigan Order*, 12 FCC Rcd at 20602, ¶ 110.

⁴³ *Iowa Utils. Bd.*, 119 S. Ct. at 730.

⁴⁴ *Id.* at 732.

⁴⁵ *Id.*

the *Iowa Utilities Board* decision came down, most states were already establishing rates by applying the TELRIC methodology.⁴⁶ Citing both the New York and Georgia commissions as trend-setters in this area, Chairman Kennard recognized this de facto cooperation between state and federal regulators: “while the lawyers fought it out in the appellate courts, federal and state regulators quietly coalesced around pricing rules that are substantially similar in approach and procompetitive.”⁴⁷

The NYPSC, for example, conducted a series of proceedings implementing TELRIC rates for unbundled network elements (“UNEs”) including loops, switching, interoffice transport, and signaling.⁴⁸ The NYPSC is considering the appropriate rates for xDSL-conditioned loops,⁴⁹ and it has since opened a new docket to explore the need for changes to its UNE rates.⁵⁰ Pending the outcome of these proceedings, Bell Atlantic’s interim charges are subject to true-up.⁵¹ In all, the TELRIC proceedings in New York have already spanned more than three years and involved extensive hearings, and CLECs were allowed to make extensive cost submissions and present expert testimony.⁵²

⁴⁶ *Ameritech Michigan Order*, 12 FCC Rcd at 20698, ¶ 290.

⁴⁷ See William E. Kennard, Moving On, Remarks Before NARUC, Winter Meeting, Feb. 23, 1999, available at <<http://www.fcc.gov/commissioners/kennard/speeches.html>>.

⁴⁸ Bell Atlantic Br. at 65-66.

⁴⁹ NYPSC Eval. App. at 79.

⁵⁰ Bell Atlantic Br. at 73 n.61.

⁵¹ NYPSC Eval. App. at 66.

⁵² Bell Atlantic Br. at 66.

Like the NYPSC, other state commissions have gone to great lengths to implement TELRIC pricing rules for interconnection and UNEs. In Georgia, for example, BellSouth followed a directive of the Georgia PSC and prepared extensive cost studies based on forward-looking technology.⁵³ The Georgia PSC subsequently adjusted, and eventually adopted, BellSouth's TELRIC studies as adjusted.

Attempting an end-run around the NYPSC and state pricing proceedings generally, AT&T claims that certain Bell Atlantic prices "fail to reflect the 'uniform principles' embodied in TELRIC methodology."⁵⁴ AT&T then goes on to criticize the NYPSC's TELRIC methodology as a "misapplication of pricing principles."⁵⁵ According to AT&T, TELRIC embodies an unvarying and consistent system of pricing elements that is to be uniformly applied across all states and allows no variations.⁵⁶ AT&T's argument thus leads to the proposition that the Commission should deny Bell Atlantic's application because the NYPSC's TELRIC methodology allegedly uses the costs of fiber-optic cable instead of the lower costs of copper feeder for shorter loops.⁵⁷

⁵³ In adopting these TELRIC rates, The Georgia PSC stated:

The Commission's stated goals were to adopt a preferred methodology, approve a cost study or set of cost studies, and determine the resulting cost-based rates for interconnection with the unbundling of BellSouth's telecommunications services, pursuant to the Federal Telecommunications Act of 1996.

Order, Docket No. 7061-U (Georgia PSC Oct. 21, 1997).

⁵⁴ AT&T Comments at 58.

⁵⁵ *Id.* at 59.

⁵⁶ *Id.* at 64 & n.27.

⁵⁷ *See id.* at 58.

The Commission has rejected such an inflexible view of TELRIC principles and should do so again here. In its *Ameritech Michigan Order*, the Commission clarified that TELRIC principles do allow for some variation between the states:

TELRIC principles will not generate the same price in every state; indeed it will *not even generate the same formula for pricing in every state*. But such principles are fair and procompetitive and should create even opportunities for entry in every state, while permitting, indeed obliging, each state commission to determine prices on its own.⁵⁸

Any other approach would effectively turn every section 271 proceeding into an open forum to revisit every factor or variable that was either included in, or excluded from, the state commission's application of TELRIC. These are precisely the kinds of issues that should be left to the appropriate state commission to decide, provided that the state commission (subject to the pending appeal before the Eighth Circuit regarding pricing methodologies) implements TELRIC in a manner that reasonably captures forward-looking economic costs.⁵⁹

Other commenters claim that Bell Atlantic's charges for xDSL-conditioned loops are not priced at TELRIC-based rates.⁶⁰ Unlike AT&T, these CLECs are not challenging the NYPSC's pricing methodology. Rather, they simply claim that one particular rate was not included in the TELRIC proceedings. But the NYPSC has already accommodated these concerns and has convened a separate accelerated track in its rate proceedings to address this issue.⁶¹ In the

⁵⁸ *Ameritech Michigan Order*, 12 FCC Rcd at 20699, ¶ 291 (emphasis added); *see also* Kennard, *Moving On*, *supra* note 47.

⁵⁹ *See Ameritech Michigan Order*, 12 FCC Rcd at 20698, ¶ 290.

⁶⁰ *See, e.g.*, ATLS Comments at 36; CoreComm Comments at 6; Rhythms NetConnections Comments at 11.

⁶¹ NYPSC Eval. App. at 79.

meantime, Bell Atlantic charges both non-recurring and recurring rates subject to a true-up.⁶² As discussed above, where new technologies and requirements are concerned, states must be allowed to adopt reasonable, interim approaches that ensure market openness. The NYPSC has done just that by ensuring that CLECs can enter the market with reasonable interim rates today, while being guaranteed that the rates ultimately paid are consistent with all FCC and NYPSC pricing rules.

D. The Commission Should Reject Proposals To Condition Section 271 Authorization On Resolution of Routine Enforcement Issues.

CLECs further ask this Commission to expand its own enforcement responsibilities at the expense of the states, notwithstanding the unsettled law in this area.⁶³ The CLECs do so, moreover, without ever explaining why this Commission is better situated than the states to address enforcement of interconnection agreements and related requirements under section 251. ALTS, for example, recommends that the Commission set up a new “rocket docket” to deal with “antibacksliding” issues.⁶⁴ Other CLECs address more specific enforcement issues, such as e.spire’s proposal that the Commission require Bell Atlantic to eliminate certain termination penalties in its service contracts with retail customers.⁶⁵ Once again, the Commission should reject the CLECs’ efforts to delay or further complicate Bell company provision of interLATA services.

⁶² *Id.* at 80.

⁶³ *See Iowa Utils. Bd.*, 119 S. Ct. at 733 (leaving open the question whether the Commission has jurisdiction to review interconnection agreements).

⁶⁴ ALTS Comments at 81-82.

⁶⁵ e.spire Comments at 3-10.

ALTS's proposal is unnecessary. As ALTS admits, the Commission already has in place an expedited enforcement regime to deal with competition-affecting issues under the Telecommunications Act of 1996.⁶⁶ In the *Second Report and Order*, the Commission provided for resolution of expedited complaints within sixty days, with the additional possibility of review by the full Commission.⁶⁷ While the Staff has discretion concerning which complaints to accept for expedited processing, there is no reason to believe that the Staff will exercise this discretion inappropriately.⁶⁸ ALTS's request for further federal complaint procedures is wholly unjustified.

Similarly, e.spire's suggestion that the Commission intervene in a termination penalty dispute is simply a request for the FCC to preempt state resolution of a disagreement about the terms of Bell Atlantic's local retail offerings. Not every ongoing state dispute is grounds to oppose a section 271 application. Rather, a termination penalty is precisely the sort of contractual pricing issue that state commissions handle every day in regulating telecommunications carriers; they should be allowed to resolve such issues even where the regulated carrier is a Bell company.

II. NONDISCRIMINATORY PERFORMANCE MUST BE MEASURED AGAINST THE BELL COMPANY'S OWN PERFORMANCE IN THE STATE WHERE INTERLATA RELIEF IS SOUGHT.

The Commission has interpreted the nondiscrimination requirements of the competitive checklist to mean that where such a comparison is possible, the Bell company must provide

⁶⁶ Second Report and Order, *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures To be Followed When Formal Complaints are Filed Against Common Carriers*, 13 FCC Rcd 17018 (1998) ("*Second Report and Order*"); see ALTS Comments at 82.

⁶⁷ *Second Report and Order*, 13 FCC Rcd at 17021, ¶ 4.

⁶⁸ *Id.* at 17028, ¶ 17.

CLECs access “in substantially the same time and manner” as the Bell company or its non-CLEC customers obtain access.⁶⁹ For other functions that have no analogue, a Bell company must “offer access sufficient to allow an efficient competitor a meaningful opportunity to compete.”⁷⁰ In the final analysis, this second standard also requires a comparison between the Bell company’s offerings to CLECs and the Bell company’s offerings to its own retail operations and customers, because the CLECs’ ability to compete includes the ability to compete against the retail offerings of the Bell company.⁷¹

Despite these clearly stated standards, some CLECs persist in suggesting that Bell Atlantic and other BOCs can be required to show that they are providing better-than-equal facilities and services. AT&T, for example, argues that OSS flow-through rates the Commission has discussed in its section 271 decisions somehow provide an absolute minimum for any future Bell company applications. Claiming that Bell Atlantic’s flow-through rates for certain orders in New York are lower than BellSouth’s flow-through rate in Louisiana, AT&T concludes that this is evidence of a lack of parity.⁷² AT&T admits that it is not making any comparison to Bell Atlantic’s retail flow-through rates in New York, and this is fatal to its argument.⁷³ The

⁶⁹ *Second Louisiana Order*, 13 FCC Rcd at 20655, ¶ 87; *see also* First Report and Order, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd 15499, 15660, ¶ 315 (“*Local Competition Order*”), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, rev’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) (discussing nondiscrimination requirements of 1996 Act).

⁷⁰ *Second Louisiana Order*, 13 FCC Rcd at 20655, ¶ 87; *see also Local Competition Order*, 11 FCC Rcd at 15660, ¶ 315.

⁷¹ *See Local Competition Order*, 11 FCC Rcd at 15763-64, ¶ 518.

⁷² AT&T Comments at 16.

⁷³ *Id.*

Louisiana market has no relevance here. Moreover, raw data reflecting percentages of flow-through cannot tell whether orders fail to flow through because the orders are not designed to flow through to the Bell company's systems or because of problems with CLEC ordering.⁷⁴

Opponents of Bell Atlantic's application similarly err by attempting to prove discrimination simply by describing the OSS interfaces and processes Bell Atlantic makes available to CLECs, without also examining Bell Atlantic's own retail systems.⁷⁵ This Commission "has not required that incumbent LECs follow a prescribed approach in providing access to OSS functions"⁷⁶ Accordingly, evidence that a more efficient or more accurate system or process exists has no weight, unless that system or process is actually available to the Bell company's comparable operations or (in the absence of comparable Bell company operations) is needed to allow the efficient CLEC to compete in the particular geographic and product market. Allegations that there may be a better way are simply not enough.

III. THERE IS NO METRIC TEST FOR BELL COMPANY INTERLATA ENTRY.

In their discussion of the Commission's public interest inquiry, both AT&T and its mouthpiece, the Competition Policy Institute ("CPI"),⁷⁷ contend that Bell Atlantic's market share

⁷⁴ *NPRM*, 13 FCC Rcd at 12851, ¶ 75.

⁷⁵ See AT&T Comments at 18 (processing of complex orders and system integration); Northpoint Comments at 5 (loop qualification); MCI WorldCom Comments at 34 (same); see also DOJ Eval. at 25-27.

⁷⁶ *Ameritech Michigan Order*, 12 FCC Rcd at 20616, ¶ 135.

⁷⁷ CPI was created by the incumbent long distance carriers and receives virtually all of its funding from AT&T, MCI, the Telecommunications Resellers Association, and the National Cable Television Association. See Hearing Testimony of Ronald J. Binz, Joint Application of Pacific Telesis Group and SBC Communications Inc., Application 96-04-038 (Cal. PUC Nov. 19, 1996). CPI has never received "any funding from actual consumers," *id.* at 2612-15, and its policy positions reflect "input from its corporate sponsors . . . [AT&T and MCI]," *id.* at 2624, 2626. CPI's main sponsors are listed on its website. See <<http://www.cpi.org/sponsors.htm>>.

precludes meaningful consumer choice of local exchange carriers. From this, they conclude that it would not be in the public interest to allow Bell Atlantic to provide interLATA service in New York.

As a matter of law, the Commission has rejected this hackneyed argument that a Bell company must lose some threshold amount of local market share before it may provide interLATA services. In the *Ameritech Michigan Order*, the Commission explained that it does not “read section 271(c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a ‘competing provider.’”⁷⁸ Likewise, the Commission held in its *Ameritech Michigan Order* and *Second Louisiana Order* that Bell company interLATA relief should not be contingent upon the local market-entry strategies of CLECs.⁷⁹ In a speech delivered last year, Chairman Kennard summarized the Commission’s position:

Let me say a word about approaches we are not taking, because they are not the law. There will be no market share test. The law makes clear that the door to competition must be open, and 271 approval can be granted regardless of whether competitors walk through the open door.⁸⁰

Ignoring these Commission holdings, AT&T offers a study analyzing CLEC entry in “relevant service and geographic markets.”⁸¹ AT&T concludes, not surprisingly, that the CLECs “follow the money” – they are more active as providers of business services than residential

⁷⁸ *Ameritech Michigan Order*, 12 FCC Rcd at 20585, ¶ 77.

⁷⁹ *Id.* at 20602-03, ¶ 111; 13 FCC Rcd at 20635, ¶ 48.

⁸⁰ William Kennard, Remarks before Legg Mason “Telecom Investment Precursors” Workshop, Mar. 12, 1998, *available in* 1998 WL 110193, at *11.

⁸¹ AT&T’s Kelly Aff. ¶ 22.

services and serve more lines in urban than in rural areas.⁸² CPI parrots AT&T's points.⁸³

As DOJ explains, however, this pattern of CLEC entry has little if anything to do with Bell Atlantic. "Competitive entry has been concentrated in metropolitan areas, and in the New York City metropolitan area in particular, for two main reasons": the average revenue per customer is higher for business customers than for residential customers, and facilities-based CLECs can serve densely populated areas at a lower cost per customer.⁸⁴

AT&T's numbers are not only misleading, they are also legally irrelevant. Once a Bell company has satisfied its obligations under the checklist and thus demonstrated that its local-service markets are open to competition, the Bell company does not have to drag competitors into the market. It follows not only that Bell Atlantic is not required to show any particular loss of lines, but also that – if Bell Atlantic's application is granted – line loss in New York will not be a standard for other states. This second point is particularly important given the urban concentration and lucrative business service opportunities that make New York arguably "unique."⁸⁵ If Congress rejected the entire concept of a market share test,⁸⁶ then it most certainly did not intend that an exceptional market would establish such a test for the rest of the country.

CONCLUSION

This is a proceeding for interLATA relief, not an exercise in policymaking or incremental rulemaking. If the Commission applies the requirements of section 271 without overstepping the

⁸² AT&T's Bernheim Aff. ¶¶ 25-28.

⁸³ CPI Comments at 3-4, 14-16.

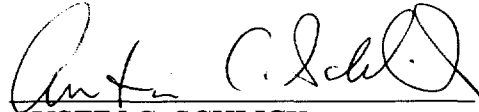
⁸⁴ DOJ Eval. at 10.

⁸⁵ *Id.* at 8-10.

⁸⁶ *Ameritech Michigan Order*, 12 FCC Rcd at 20585, ¶ 77 & n.170.

boundaries of its inquiry or seeking to alter the balance of federal and state responsibility, it will swiftly approve Bell company applications. Doing so will advance Congress's goal of opening both local and long distance markets to competition, and it will serve the public interest.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Austin C. Schlick", written over a horizontal line.

AUSTIN C. SCHLICK
GEOFFREY M. KLINEBERG
JIDE O. NZELIBE
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

CHARLES R. MORGAN
JIM O. LLEWELLYN
JONATHAN B. BANKS
1155 Peachtree Street, N.E.
Atlanta, Georgia 30367
(404) 249-2051

November 8, 1999